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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

PETITIONER'S REPLY BRIEF.

Answering Respondent's First and Second Propositions.

A careful reading of respondent's brief reveals that it is built around a half-hearted assertion that the Ohio trial court found that petitioner was not the real party in interest under the law of the forum and that the Ohio judgment is based, therefore, upon an independent ground of State procedure. Respondent seeks to invoke the principle that where an appellate process brings a judgment of a State court before the Supreme Court for review, this Court will inquire whether the judgment of the State court was based upon a non-Federal ground adequate to support it.

The foregoing principle has been applied to prevent consideration of Federal rights where the ruling of the State court was based on such independent grounds as a volun-

tary payment of taxes, *res judicata*, laches and the statute of limitations.

Gaar, Scott & Co. v. *Shannon*, 223 U. S. 468;
Northern Pacific Railroad Co. v. *Ellis*, 144 U. S. 458;
Moran v. *Horsky*, 178 U. S. 205;
Rector v. *Ashley*, 6 Wall. 142.

It is conceivable that the principle would be accorded recognition where suit on a foreign judgment is defended on the ground of payment after judgment, general release after judgment or lack of capacity to sue by reason of assignment of the judgment and the defense is deemed by the trial court to have been established.

It is noteworthy, however, that the adjudicated cases and the aforementioned illustrations involve non-Federal questions unconnected with a recognized and uncontradicted Federal right. To assert that the judgment creditor may not recover on his judgment in a foreign State because he assigned the judgment after the recovery thereof is not violative of the full faith and credit clause. But to assert that the judgment creditor cannot proceed in another State on the foreign judgment itself by reason of defenses (alleged or real) existing *prior* to its rendition, involves, directly so, *disregarding constitutional safeguards*. That is exactly the instant case.

To find that petitioner was not the real party in interest under the Ohio law, the Ohio courts determined first, that petitioner was not the real party in interest in the New York suit and that he perpetrated a fraud upon the New York courts. In making such determination, the Ohio courts went, of necessity, behind the New York judgment, conclusive as to all matters which were actually determined and all matters which might have been litigated—including the defense of lack of capacity to sue.

In other words, the so-called non-Federal ground, relied upon by respondent, is not a ground independent of the judgment itself, and, therefore, this Court may properly give consideration to the Federal right involved. Any other view of the situation would mean that "a non-Federal ground" could be used as a pretext or cloak to evade a decision of a Federal question, and constitutional safeguards might be so warped by State courts as to become "sound and fury, signifying nothing".

The foregoing is not mere theorization. It is simply an oft-repeated and well-established amplification of the rule that the Supreme Court will not assume jurisdiction where a State court based its judgment on a non-Federal ground *adequate to support it.* True amplification of the general principle comprehends three factors: (1) the non-Federal ground must be broad enough to sustain the judgment; (2) it must be independent, that is, *not so interwoven with the Federal question as to be inescapable of separate treatment and determination;* and (3) *a non-Federal ground, plainly untenable, will not defeat review.*

Robertson and Kirkham on "Jurisdiction of the Supreme Court of the United States", pages 156-158;
Creswill v. *Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261;
Enterprise Irrig. Dist. v. *Canal Co.*, 243 U. S. 157, 163-165;
Ward et al. v. *Love County*, 253 U. S. 17, 22;
Davis v. *Wechsler*, 263 U. S. 22, 24;
Moran v. *Horsky*, 178 U. S. 205.

In *Gear, Scott & Co.* v. *Shannon, supra*, relied upon by the respondent, the principle is expressed in the following language on page 471:

"It is, however, equally well settled that if the Federal question is properly presented and necessarily con-

trols the determination of the case, the appellate jurisdiction of this court is not defeated because the decision is put upon some matter of local law. West Chicago R. R. Co. v. Chicago, 201 U. S. 506, 520."

Not only is it clear that the Ohio courts disregarded the full faith and credit clause when they went behind the New York judgment to find that petitioner was not the real party in interest—a ground dependent upon and interwoven with the Federal question—but it is also clear that the non-Federal ground is plainly untenable in view of the abundance of authority on the point that the instrument of reassignment (R. 83-85, 85-88; Petitioner's Exhibits D, E) constituted petitioner the real party in interest. (See Petitioner's Point III.) The latter disposes, as well, of respondent's reliance on the doctrine expressed in *Klinger* v. *Missouri*, 13 Wall. 257, that where it does not appear upon which of two grounds the decision was based, whether the Federal or non-Federal ground, then this Honorable Court will refuse to review only if the non-Federal ground (assuming it is independent) is *"a good and valid one"*.

Respondent's contention that it does not appear that the Ohio courts dealt with any Federal question was fully discussed in the petition for writ of certiorari herein; and on pages 17, 18, 22 and 23 thereof complete answer is made to respondent's argument.

Respondent relies upon the procedural statute of Ohio which provides that an action must be prosecuted in the name of the real party in interest. What he overlooks is that if suit were brought in Ohio on the original cause of action a procedural statute in Ohio would apply; but in the instant case suit was brought on a judgment which is already in the name of petitioner, that is to say, petitioner has legal title to the judgment; and, therefore, with respect to the judgment, petitioner is the real party in interest in

Ohio. The procedural statute in Ohio cannot possibly be applied to the original cause of action upon which suit was commenced in New York and not in Ohio.

Respondent's second proposition, which implies that this Court will not review the findings upon which the Ohio courts determined that petitioner was not the real party in interest and that he perpetrated a fraud upon the New York courts, overlooks the point that the findings are completely interwoven with the denial of full faith and credit to petitioner's judgment (see Point VI of petitioner's main brief.)

Answering Respondent's Third Proposition.

On page 28 of respondent's brief, it is stated that *Banca v. Clarkson*, 274 N. Y. 69, "is not helpful for the reason that the facts and circumstances of the agreement before the court do not appear from the reported opinion". Page 74 of the *Clarkson* opinion indicates, however, the absolute simplicity of the arrangement made between the surety company and the plaintiff, who suffered the loss which was made good by the surety company. An examination of the record on appeal will indicate that there was no formal trust. *The agreement was fully set forth in the opinion.*

Brown v. *Ginn*, 66 O. S. 316, is referred to by the respondent on page 28 of his brief, but that authority is wholly inapplicable herein. In that case the assignment of a claim was made to an attorney and the attorney's fee was to be paid from the proceeds of suit. Unlike the instant case, the attorney had no beneficial interest whatsoever except to the extent of his fee and the expenses advanced by him—an interest that was purely contingent in character. No comparison whatsoever can be made between the contingent interest of the attorney in *Brown* v. *Ginn* and the actual beneficial interest of petitioner in the case under review. *Brown v. Ginn* involved an assignment to an attorney with com-

pensation to the attorney depending entirely upon his success in enforcing the obligation. The case relates, therefore, to a transaction champertous in nature—a factor recognized in *Stricks v. Siegel*, 135 N. Y. Misc. Rep. 60, affirmed as modified 188 N. Y. Misc. Rep. 266.

Respondent attempts to make capital of the point that under the Ohio Code, equitable defenses may be interposed in an answer and that, therefore, respondent's procedure in Ohio constituted a direct attack upon the New York judgment. *The fact remains, however, that respondent's answer, interposed in the Ohio suit, did not seek to vacate the judgment recovered by petitioner in the State of New York and that the judgment in the Ohio suit did not set aside the New York judgment.* New York State is also a State in which distinctions between law and equity have been abolished. Section 8 of the Civil Practice Act of the State of New York mentions that there is only one type of civil action, but in actual practice careful distinctions are still drawn between actions at law and proceedings in equity.

E.T.C. Corporation v. Title Guarantee & Trust Company, 271 N. Y. 124.

Respondent did not seek by way of his answer to obtain equitable relief and, therefore, he is precluded from claiming that his attack upon the judgment was other than a collateral one.

Phillips v. Griffin, 236 N. Y. App. Div. 209, 211, states clearly, despite the fact that the State of New York has eliminated the distinction between equity and law, that to attack a judgment for fraud, suit must be had in equity.

On page 32 of respondent's brief, reference is made to *Dobson v. Pearce*, 12 N. Y. 156. The decision in that case was based upon the theory that when the action was brought in Connecticut upon the New York judgment, the

defendant filed a bill against the plaintiff on the equity side of the court. That procedure constituted a direct attack upon the judgment. All that the respondent did in the instant case (R. 40, 41) was to set up his affirmative defense and "the defendant prays that he may go hence without day and have his costs herein".

Page 42 of respondent's brief states that *Armstrong* v. *Armstrong*, 117 O. S. 556, was cited by petitioner. Petitioner's brief, however, makes no mention of that authority. It is cited on a general point in petitioner's brief in support of the petition for certiorari.

On page 39 of respondent's brief, attempt is made to minimize the applicability of *Matter of Holden*, 271 N. Y. 212. The *Holden* case is relied upon by petitioner as being conclusive upon the point that petitioner's judgment would not be impeached in New York (see page 18 of petitioner's brief). Respondent's discussion of this case would make it appear that the assignee perpetrated a fraud upon the assignor and that the assignee then made an assignment to another assignee with the result that the fraud related to a purely remote transaction. Unfortunately, the opinion in the case does not set forth the facts with completeness, but when recourse is had to the record on appeal in the case, it is apparent that *Matter of Holden* is adequate authority. In that case, one Hennenlotter, obtained an assignment of a condemnation award by fraud. He took the assignment in the name of an admitted "dummy", one Barbara Nelson, his sister-in-law. Based upon the assignment the Appellate Division made an order granting the right to Nelson to receive payment of the award; and after payment was made the assignors then started the proceeding to vacate the Appellate Division order. That proceeding was brought against Hennenlotter and his attorney. Barbara Nelson was named as a respondent but she took no part in the defense—and that was quite consistent with

her role of "dummy". The Court of Appeals' opinion refers to Hennenlotter as Nelson's assignor, but it is apparent that that description is not correct because the original owners were the assignors and Hennenlotter was the assignee through his "dummy" Nelson. The original owner of the condemnation award claimed that because the assignment was procured by fraud, the prior proceeding to withdraw the proceeds of the award constituted a fraud upon the court. In other words, the real claim was that since Hennenlotter knew that he obtained the assignment by fraud, he knew that he had no right to sue for the proceeds and that in suing therefor (through his "dummy" Nelson) he perpetrated a fraud upon the court. The Appellate Division vacated the order awarding payment and directed Hennenlotter to redeposit the money which he had received; but the Court of Appeals reversed the order and dismissed the proceeding. *In summary, the Court of Appeals held that knowledge by an assignee of the fact that his assignment is vulnerable by reason of fraud in the obtaining thereof and that he had no right to sue is not sufficient to constitute a fraud upon the court.*

Respondent relies (p. 41) upon *Ward* v. *Southfield*, 102 N. Y. 287, to show that a judgment may be attacked collaterally because of fraud. It is noteworthy, however, that *Ward* v. *Southfield* constituted a direct attack upon a judgment and that the excerpt from the opinion (page 293) relied upon by respondent is *dictum*, unsupported by any authority which links, improperly so, collateral attack with vacating a judgment.

Respondent relies (pages 43-46) upon a number of cases, decided in the courts of various States, to show that fraud may be utilized for the purpose of attacking a judgment. It is fair to state, however, that those authorities may be classified in the following manner:

(1) A number of the cases involve fraud in obtaining jurisdiction.

Cohen v. *Bromberg*, 170 N. W. 478;
Mendlowitz v. *Shoe Company*, 5 S. W. (2d) 559;
Hare v. *Reily*, 269 S. W. 473;
Morris v. *Morris*, 269 N. Y. S. 636;
Lorrick v. *Walter*, 29 O. A. 363;
Capper v. *Short*, 11 S. W. (2d) 717.

(2) Other opinions uphold a judgment and go on to state that the judgment is not conclusive if fraud is established, but they do not indicate whether they mean thereby that the fraud shall be utilized in a direct attack or that it may be utilized by way of collateral attack.

Lamb v. *Stock Co.*, 132 Fed. 434;
Webb v. *Friedberg*, 126 S. E. 506;
White v. *Minder*, 148 Atl. 781;
Franklin v. *Lee*, 253 N. Y. S. 620;
Ring v. *Whiteman*, 140 S. E. 150.

(3) A number of cases relate to instances in which no adversary trial was had.

Cohen v. *Bromberg*, 170 N. W. 478;
Hare v. *Reily*, 269 S. W. 473;
Schendel v. *Ry. Co.*, 210 N. W. 70;
Dyer v. *Johnson*, 19 S. W. (2d) 421.

(4) At least one authority cited by the respondent was impliedly repudiated eleven years later by the same court.

Schendel v. *Ry. Co.* (Minn. 1926) 210 N. W. 70, repudiated by *Melgaard* case, 200 Minn. 473.

On page 30 of the respondent's brief, respondent attempts to criticise the general principle that parties to an

action, as distinguished from third parties, may not attack a judgment collaterally for fraud, except possibly such fraud which goes to the question of jurisdiction. He contends that the principle applies to domestic judgments. It is submitted, however, that the principle applies as well to foreign judgments. All that *Freeman*, 5th Edition, Section 1401, states is that some jurisdictions have applied a different rule in the case of foreign judgments. *It is significant that respondent fails to give the full quotation from Freeman, Section 1401.* The following sets forth the full excerpt and everything contained therein is quite in accord with the principle as it has been described by petitioner:

> "Notwithstanding the contrary rule as applied to domestic judgments, many cases either hold or contain *dicta* to the effect that sister state and foreign judgments may be attacked collaterally for fraud. Whenever the fraud is of such a nature as to directly affect the jurisdiction of the court, there is doubtless a sound basis for such a rule, since such a case does not differ materially from any other in which a lack of jurisdiction may be shown, though it is not entirely clear as to what sort of frauds may be sufficient to prevent the acquirement of jurisdiction. But in view of the requirement that a sister state judgment shall be given the same effect as it has where rendered, the question whether it is collaterally impeachable for fraud, except where the matter is jurisdictional, ought to depend entirely upon whether such an attack may be made in the state of its rendition; and this is what some of the cases hold. If it is impeachable there for fraud, it is to some extent impeachable elsewhere. *However, as we have elsewhere shown, the rule is almost if not quite universal, that a judgment cannot be collaterally attacked on this ground in the state where it was rendered, except by persons who were not parties or privy to it but against whom it would otherwise be conclusive on the theory of representation or contractual obligation. It is doubtless for this reason that some courts*

has laid down the rule broadly that judgments from other states cannot be collaterally impeached for fraud, some of them going to the extent of saying that relief on this ground must be sought in the courts of the other state, in some direct proceeding for that purpose.'' (Italics ours.)

Conclusion.

The mere enumeration of the following matters raised in petitioner's main brief, which respondent has avoided answering, bespeaks tacit admission on respondent's part of petitioner's right to relief herein:

1. Respondent has carefully avoided denial of the fact that an adversary trial was had.

2. Respondent has refrained from ascertaining the factual basis of the *Clarkson* case, 274 N. Y. 69 (petitioner's brief page 23), pursuant to which petitioner was at least a trustee, capable of bringing suit; and he has refrained from a discussion of the case on the merits.

3. Respondent has ignored the historic significance of the "attorney-in-fact" clause in the reassignment (petitioner's brief, page 24).

4. He has disregarded the fact that petitioner is fully capable of granting him complete discharge from his indebtedness and that petitioner has a definite beneficial interest by reason of the payment of his debts and his right to the remainder (petitioner's Point III).

5. He has avoided the charge that a refusal to grant petitioner relief herein would permit respondent to profit from a fraud *proved by documentary evidence* (petitioner's brief, page 4).

6. Just as respondent would have had the burden of establishing the defense of payment, release, statute of limitations or assignment of judgment, so he had the burden of

proving that petitioner's judgment was impeachable by extrinsic fraud in New York if petitioner was not the real party in interest; and this burden respondent did not meet (petitioner's brief, page 17). Respondent makes the ridiculous attempt (respondent's brief, page 37) to assert that the New York courts have held that an alleged partial assignment of petitioner's claim to London I. Walliek constituted a fraud upon the court, when all that occurred was that a new trial was granted so that a trial court could weigh the testimony of London I. Walliek in the light of his alleged claim. This was so stated by Mr. Justice Valente when he granted the motion for a new trial (R. 105, 106).

7. Respondent has failed to disprove the fact that he possessed knowledge in March 1929 of petitioner's prior assignment and that he failed to interpose an appropriate defense in the New York action (petitioner's brief, pages 10, 35).

Respectfully submitted,

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